MOHD ASMADI YUSOF A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
ZAINUN ALI JCA
ABU SAMAH NORDIN JCA
SULONG MATJERAIE JCA
[CRIMINAL APPEAL NO: T-05-45-2002]
9 JULY 2008 C

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Accused killed deceased by hitting his head hard with a brick - Whether prima facie case established - Maximum evaluation of credibility of witnesses and their testimonies - Evidence of witnesses corroborating each other regarding accused assaulting deceased - Penal Code, s. 300(a), (c), (d)* D

CRIMINAL PROCEDURE: *Appeal - Conviction, against - Finding of facts - Crucial matter not put to prosecution witness during cross-examination - Failure to cross-examine meant testimony of witness cannot be disputed - Whether justified appellate interference* E

CRIMINAL PROCEDURE: *Defence - Alibi - Pre-trial notice - Section 402A Criminal Procedure Code - Failure to give mandated notice to prosecution - Whether fatal - Evidence in support of defence of alibi - Whether to be excluded* F

EVIDENCE: *Witness - Credibility - Witness for the prosecution - Infirmities in evidence of witness - Whether a believable witness - Credibility of witness is primarily a matter for trial judge*

G

The appellant was charged for murder, an offence under s. 302 of the Penal Code. He was said to have caused the death of one Aswadi ('deceased') at about 8pm at a night market. PW2 and his wife PW3 gave evidence that they were selling compact discs (CDs) at their stall at the night market. There were some ten customers there, including the deceased. PW2 and PW3 heard a loud noise and saw the deceased fall on the display table and then fall on to the ground. PW2 and PW3 saw an attacker, one Malay man, hitting the deceased hard on his head two or three times using a red-brick. The brick shattered to bits and the assailant continued to hit the deceased with his hands and legs even when the deceased fell onto H I

A the ground. PW4 testified that he met his brother, the deceased, at the night market on the night of the incident. While discussing as to what CD to buy at the CD stall, PW4 heard the sound of CDs falling on to the ground and then saw the deceased bleeding. PW4 saw the appellant kick the deceased twice on his face and chest. B PW4 recognised and knew the appellant. In his defence the appellant claimed that at the time and date of the alleged offence, he was away fishing in the middle of the sea, off Mersing. The defence attempted to adduce evidence of *alibi* but failed to give the written notice as prescribed by s. 402A(1) Criminal Procedure Code C ('CPC'). DW2 testified that PW4 was at the night market at the time of the incident but that PW4 was not at the scene of the crime as claimed by PW4. DW2 claimed to have met PW4 at a clothing stall. As such it was claimed that it would not be safe to rely solely on PW4's testimony without further corroborating D evidence. The learned trial judge found the appellant guilty, and convicted and sentenced him to death. The appellant appealed against his conviction and his sentence on the following grounds: (a) that the appellant was called to defend himself at the end of the prosecution case although a *prima facie* case had not been E established against him; (b) that there was no evidence to show that it was the appellant who caused the head injury to the deceased; (c) that the trial judge gave undue weight to the evidence of PW4; (d) that the trial judge erred in rejecting the testimony of DW2; (e) that the evidence of PW5 (the Pathologist who performed a post F mortem) should not have been accepted as conclusive evidence; (f) that the trial judge considered irrelevant facts; and (g) that the trial judge erred in relation to the contraption used resulting in the death.

G **Held (dismissing the appeal)**
Per Sulong Matjeraie JCA:

(1) The learned trial judge had carried out a maximum evaluation of the evidence before him and applied the right principles. It H was only after applying maximum evaluation on the credibility of the witnesses and their testimonies that the trial judge held that the prosecution had made out a *prima facie* case against the appellant. (paras 16 & 19)

(2) The notice prescribed by s. 402A(1) CPC is a statutory I requirement. The word "shall" in the said provision denotes a mandatory requirement. The trial judge correctly held that there

was no supporting evidence on the accused's *alibi* defence. Failure to give such notice under s. 402A(1) would render the evidence inadmissible. (paras 23-25)

(3) The trial judge recognised there were some infirmities in the evidence of PW4. Upon a total evaluation of his evidence, the trial judge made a finding that PW4 was a believable witness. The credibility of a witness is primarily a matter for the trial judge. (paras 29-31)

(4) The trial judge was right in coming to the conclusion, at the close of the prosecution case, that from the testimonies of PW4, PW2 and PW3, the appellant was the one who attacked the deceased. The evidence of PW2, PW3 and PW4 corroborated each other as to the assault and who assaulted the deceased on the night of the incident. (paras 32-33)

(5) It was the finding of the trial judge that a brick was used as a weapon that killed the deceased. This was never disputed before the trial judge. (paras 38-39)

(6) The allegation of the meeting between DW2 and PW4 at the clothing stall was critical but was never put to PW4 when PW4 testified that he could not recall meeting DW2 at 8pm on that eventful evening. The failure to cross-examine and to put across the essential and material case of the appellant meant that the testimony given by PW4 alleging that he could not recall meeting DW2 on the night in question could not now be disputed. The trial judge had correctly rejected the evidence of DW2. (paras 43, 45 & 46)

(7) PW5's testimony on the injuries sustained by the deceased was consistent with the evidence of PW2 and PW3 that a brick was used to strike hard on the head of the deceased and the deceased being kicked. Hence, the trial judge was correct in finding that the acts of the appellant in causing the death of the deceased fell under s. 300(a), (c) or (d) of the Penal Code. PW5 was not cross-examined, meaning that this evidence was fully accepted by the appellant. (paras 50-52)

Bahasa Malaysia *Translation Of Headnotes*

Perayu dituduh membunuh, suatu kesalahan di bawah s. 302 Kanun Keseksaan. Beliau dikatakan telah mengakibatkan kematian seorang yang bernama Aswadi ('si mati') pada pukul 8pm di sebuah

pasar malam. PW2 dan isterinya PW3 memberi keterangan bahawa mereka sedang menjual cakera padat (CD) di gerai mereka di pasar malam tersebut. Terdapat lebih kurang 10 pelanggan di sana, termasuk si mati. PW2 dan PW3 terdengar satu bunyi kuat dan melihat si mati jatuh atas meja pameran dan kemudiannya jatuh ke atas lantai. PW2 dan PW3 nampak seorang penyerang, seorang lelaki Melayu, memukul si mati dengan kuat atas kepalanya dua atau tiga kali menggunakan sebuah bata merah. Bata itu pecah berkecai dan penyerang tersebut sambung memukul si mati dengan tangan dan juga kakinya meskipun si mati telah jatuh ke atas lantai. PW4 memberi testimoni bahawa beliau telah jumpa abangnya, si mati, di pasar malam tersebut pada malam insiden itu. Semasa membincangkan CD mana untuk beli di gerai CD, PW4 terdengar bunyi CD jatuh ke atas lantai dan kemudiannya nampak si mati berdarah. PW4 nampak perayu tendang si mati dua kali pada muka dan dadanya. PW4 mengecam dan mengenali perayu. Dalam pembelaannya perayu mendakwa bahawa pada masa dan tarikh kesalahan yang dikatakan itu, beliau sedang memancing di tengah lautan, dekat Mersing. Pembelaan cuba mengemukakan keterangan *alibi* tetapi gagal memberikan notis bertulis seperti yang diperuntukkan oleh s. 402A(1) Kanun Acara Jenayah ('KAJ'). DW2 memberi testimoni bahawa PW4 berada di pasar malam tersebut semasa insiden itu tetapi PW4 tidak berada di tempat kejadian jenayah seperti yang didakwa oleh PW4. DW2 mendakwa telah berjumpa PW4 di sebuah gerai pakaian. Oleh itu ia dihujah bahawa ia tidak selamat untuk bergantung atas testimoni PW4 sahaja tanpa lebih keterangan menyokong. Yang arif hakim perbicaraan mendapati perayu bersalah, dan menyabit dan mengenakan hukuman mati atasnya. Perayu merayu terhadap sabitan dan hukumannya atas alasan-alasan yang berikut: (a) bahawa perayu telah dipanggil untuk membela dirinya di penghujung kes pendakwaan walaupun suatu kes *prima facie* tidak dibuktikan terhadapnya; (b) bahawa tiada keterangan untuk membuktikan bahawa perayu telah menyebabkan kecederaan kepala ke atas si mati; (c) bahawa hakim perbicaraan memberi pertimbangan yang tak wajar kepada keterangan PW4; (d) bahawa hakim perbicaraan khilaf apabila menolak testimoni DW2; (e) bahawa keterangan PW5 (ahli patologi yang menjalankan bedah siasat) tidak sepatutnya diterima sebagai keterangan konklusif; (f) bahawa hakim perbicaraan telah menimbangkan fakta-fakta yang tidak relevan; dan (g) bahawa hakim perbicaraan telah khilaf tentang alat yang digunakan untuk mengakibatkan kematian tersebut.

Diputuskan (menolak rayuan)
Oleh Sulong Matjeraie HMR:

(1) Yang arif hakim telah menjalankan pertimbangan maksima keterangan di hadapannya dan telah menggunapakai prinsip-prinsip yang betul. Ia hanya selepas menggunapakai pertimbangan maksima atas kredibiliti saksi-saksi dan testimoni-testimoni mereka bahawa hakim perbicaraan telah memutuskan bahawa pendakwaan telah membuktikan suatu kes *prima facie* terhadap perayu.

(2) Notis yang diperuntukkan oleh s. 402A(1) KAJ adalah sesuatu keperluan statutori. Perkataan "akan" dalam peruntukan tersebut menandakan suatu keperluan mandatori. Hakim perbicaraan memutuskan dengan betul bahawa tidak ada keterangan sokongan atas pembelaan alibi tertuduh. Kegagalan untuk memberi notis sebegitu di bawah s. 402A(1) akan menjadikan keterangan itu tidak boleh diterima.

(3) Hakim perbicaraan mengiktiraf bahawa terdapat beberapa kekurangan dalam keterangan PW4. Atas sepenuh pertimbangan keterangannya, hakim perbicaraan membuat dapatan bahawa PW4 adalah saksi yang boleh dipercayai. Kredibiliti seseorang saksi ialah utamanya suatu perkara untuk hakim perbicaraan.

(4) Hakim perbicaraan betul apabila mencapai kesimpulan, pada penutup kes pendakwaan, bahawa daripada testimoni-testimoni PW4, PW2 dan PW3, perayu adalah orang yang menyerang si mati. Keterangan PW2, PW3 dan PW4 menyokong satu sama lain mengenai serangan dan siapa yang menyerang si mati pada malam insiden tersebut.

(5) Ia merupakan dapatan hakim perbicaraan bahawa sebuah bata digunakan sebagai senjata yang membunuh si mati. Ini tidak pernah dipertikaikan di depan hakim perbicaraan.

(6) Pengataan tentang perjumpaan di antara DW2 dan PW4 di gerai pakaian adalah kritikal tetapi tidak pernah dikemukakan kepada PW4 bila PW4 memberi testimoni bahawa beliau tidak dapat mengingati berjumpa DW2 pada 8pm di hari penuh peristiwa itu. Kegagalan untuk memeriksa balas dan untuk mengemukakan kes penting dan material perayu bermaksud bahawa testimoni yang diberi oleh PW4 mengatakan bahawa beliau tidak dapat

A mengingati berjumpa DW2 pada malam tersebut tidak boleh sekarang dipertikaikan. Hakim perbicaraan betul apabila menolak keterangan DW2.

(7) Testimoni PW5 mengenai kecederaan yang dialami oleh si mati
B adalah konsisten dengan keterangan PW2 dan PW3 bahawa sebuah bata digunakan untuk memukul dengan kuat kepala si mati dan si mati ditendang. Oleh itu, hakim perbicaraan betul apabila mendapati bahawa tindakan-tindakan perayu dalam mengakibatkan kematian si mati jatuh di bawah s. 300(a), (c)
C atau (d) Kanun Keseksaan. PW5 tidak diperiksa balas, yang bermakna keterangan ini telah diterima secukupnya oleh perayu.

Case(s) referred to:
Browne v. Dunn [1893] 6 R 69
Chua Beow Huat v. PP [1968] 1 LNS 24 HC
D *Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC*
Vasan Singh v. PP [1989] 2 CLJ 402; [1989] 1 CLJ (Rep) 166 SC
Virsa Singh v. State of Punjab AIR [1958] SC 465

Legislation referred to:
E Criminal Procedure Code, s. 402A(1)
Penal Code, ss. 300(a), (c), (d), 302

For the appellant - Zamani Ibrahim; M/s Zamani Ibrahim Tarmizan & Co
For the respondent - Mangairkarasi Krishnan DPP

F *Reported by Amutha Suppayah*

JUDGMENT

G **Sulong Matjeraie JCA:**

[1] The appellant, Mohd Asmadi bin Yusof was charged for murder and the charge reads as follows:

H Bahawa kamu pada 2 September 2000 jam lebih kurang 8.00 malam, di Simpang 3, Pekan Merchang, di dalam Daerah Marang, di dalam Negeri Terengganu telah melakukan kesalahan bunuh dengan menyebabkan kematian ke atas Aswadi bin Mohamad KP 721219-11-5225. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun
I Keseksaan.

[2] After a full trial before a learned trial High Court Judge, the appellant was found guilty. He was convicted and sentenced to death by hanging. The appellant appealed to this court against his conviction and his sentence.

[3] After hearing the submissions of learned counsel for the appellant and learned deputy, and after having considered the written submissions filed and the authorities cited we unanimously dismissed the appeal and affirmed the decision of the learned High Court Judge. We now give our reasons for doing so.

Facts Of The Case

[4] PW2, Encik Aidi Arman bin Abd. Rahman and his wife PW3 Puan Normah binti Ismail were selling compact discs (CDs) at their stall at a Night Market ('Pasar Malam') in Merchang, a town in Terengganu. There were some ten customers, including the deceased, who came to their stall to buy CDs. PW2 and PW3 heard a loud noise which sounded like "gedebuk" and saw the deceased fall on the display table. Then, they could see the deceased falling slowly on to the ground.

[5] Both PW2 and PW3 testified that they saw an attacker, one Malay man, hitting the deceased. PW2 testified that the attacker used a red-brick to hit hard, two to three times, on to the head of the deceased. The brick shattered to bits: some fell on the display table while others fell on the road. The assailant continued to hit the deceased with his hands and legs even when the deceased fell onto the ground. PW2 and PW3 testified that the assailant acted alone and he later ran off.

[6] PW4, Aswanizam bin Mohamad testified that he met his brother, the deceased, at the "Pasar Malam" on the night of the incident. The deceased asked PW4 to go with him to the stall that was selling CDs hoping to buy "Jackie Chan's CD".

[7] While discussing as to what CD to buy, PW4 turned around to look at the crowd. Suddenly he heard the sound of CDs falling on to the ground. When PW4 turned back he saw the deceased bleeding, falling and leaning against the iron pole of a big umbrella. PW4 saw the appellant kicked the deceased twice at his face and chest. PW4 recognised and knew the appellant. After kicking the deceased, the appellant ran off.

[8] The deceased was taken to Gong Balai Clinic and was later transferred to Terengganu Hospital for treatment.

[9] PW16, Dr. Mohamad Jasni bin Hassan, Medical Officer at the Terengganu Hospital testified that when the deceased was taken to the hospital, he was in a coma. An X-ray of the deceased's head reveals a fracture of the right temporal bone.

[10] In order to treat the head and save the life of the deceased, PW16 performed an operation on 3 September 2000. PW16 further testified that the deceased was in a critical condition at that time and he had a very slim chance of survival.

[11] It was the testimony of PW16 that the head injury sustained by the deceased was caused by hard object. Although further treatment was given to the deceased, he succumbed to his injuries and died on 6 September 2000.

[12] PW5, Dr. Karim bin Haji Tajuddin, the Pathologist who performed a post mortem on the deceased confirmed that the cause of the death was due to severe head injury resulting from being struck hard on the head by blunt object. Such injury according to PW5 would inevitably result in death.

[13] On 10 September 2000 at about 9.15pm the appellant surrendered himself at the Merchang Police Station and he was arrested by PW15, Chief Inspector Wan Razali bin Hasan.

Grounds Of Appeal

[14] There are nine grounds of appeal as outlined in the petition of appeal filed herein. The main grounds of appeal may be grouped and summarised as follows:

(a) The appellant alleged that the learned trial judge erred in law and in facts when he, the appellant, was called to defend himself at the end of the prosecution case where *prima facie* case has not been established against him;

(b) The appellant contends that there is no evidence to show that it was the appellant who caused the head injury to the deceased;

(c) The appellant further alleged that the learned trial judge gave undue weight to the evidence of PW4 who was not only a partisan witness but whose uncorroborated testimony contradicted the testimony of the other principal prosecution witnesses;

(d) The appellant further alleged that the learned trial judge erred in rejecting the testimony of DW2 who clearly testified that PW4 was not at the scene of the crime when the crime of murder was committed;

(e) The evidence of the Medical Officer, PW5 should not have been accepted by the learned trial Judge as conclusive evidence against the appellant;

(f) Acceptance by the learned trial judge of irrelevant facts to conclude that the appellant murdered the deceased;

(g) The learned trial judge erred in law in making a finding of facts on the contraption used resulting in the death.

Ground Of Appeal (a)

Findings Of The High Court

[15] The complaint of the appellant on appeal ground (a) was that when the learned trial judge made a finding of *prima facie* case against the appellant and further held that a case under s. 302 Penal Code had been made out particularly under s. 300(a), (c) and (d) Penal Code, a simplistic approach was adopted in making such finding by the learned trial judge.

[16] On the contrary, we note that the learned trial judge had analysed and evaluated the evidence before him. He carried out a maximum evaluation of the evidence before him and applied the right principles.

[17] At pp. 479-480 appeal record, the learned trial judge said:

> Selepas melihat dan mendengar SP2, SP3 dan SP4 memberi keterangan dan meneliti keterangan mereka dengan keterangan pendakwa yang lain, saya terima keterangan mereka dan keterangan mereka adalah mencukupi pada peringkat ini bahawa kematian simati telah disebabkan oleh perbuatan OKT. OKTlah orang yang dikenali oleh SP4 sebagai orang yang memukul simati. Walaupun SP4 tidak melihat simati telah dipukul dari awal, tetapi keterangan SP2 dan SP3 jelas menunjukkan bahawa hanya seorang lelaki Melayu sahaja yang memukul simati dari mula dia dipukul di

kepala dengan batu bata semasa berdiri sehinggalah dia jatuh di hadapan mereka, dan penyerang itu terus memukul simati semasa simati jatuh dan ketika itu, SP4 ada melihat OKT menyepak dan menendang simati. Kejadian itu berlaku dalam masa 45 saat dan serangan ke atas simati dari mula dia dipukul di kepala semasa berdiri sehingga dia diserang lagi semasa jatuh, merupakan satu kejadian yang berlaku dalam satu transaksi yang pantas dan berterusan. OKT juga dapat dicamkan oleh SP4 dalam kawat cam. Tambahan pula, SP4 sudah mengenali OKT sebelum kejadian. OKT juga berasal dari Merchang. Keterangan SP2, SP3 dan SP4 menyokong antara satu sama lain mengenai serangan OKT ke atas simati.

[18] At p. 481 appeal record the learned trial judge concluded:

Oleh itu jelas, tidak ada orang lain yang terlibat dalam serangan ke atas simati melainkan OKT seorang sahaja pada malam itu. OKTlah yang telah mencederakan simati dan kecederaan yang dialaminya menyebabkan kematian simati.

[19] It was only after applying maximum evaluation on the credibility of the witnesses and their testimonies that the learned trial judge held that the prosecution had made out a *prima facie* case against the appellant.

[20] In view of the above summation by the learned trial judge there is no reason for us to disagree with his findings. Ground (a) of the appeal is therefore without any merit and is hereby dismissed.

[21] Consequently the appellant was called to enter his defence.

Defence Of The Appellant

[22] The appellant gave evidence on oath. In his defence the appellant said that at the time and date of the alleged commission of the crime he was away fishing in the middle of the sea, off Mersing, near Tioman Island, Pahang. The defence attempted to adduce evidence of *alibi* but admitted to their failure to give written notice contrary to the requirement as prescribed by s. 402A(1) Criminal Procedure Code. It was argued that the appellant should not be penalised for his failure to give notice.

[23] We are of the view that such notice as prescribed by s. 402A(1) Criminal Procedure Code is a statutory requirement where a notice should have been given at least ten days before the

commencement of the trial. It is our view that the word "shall" that appears in the said provision denotes a mandatory requirement. In *Vasan Singh v. Public Prosecutor* [1989] 2 CLJ 402; [1989] 1 CLJ (Rep) 166, the Supreme Court discussed the distinction between a bare denial and an *alibi* defence. At p. 169, Harun SCJ delivering the judgment of the court said:

> The defence of *alibi* is a legitimate defence and in fact is often the only evidence of an innocent man. The difficulty, it seems to us, is when and how to exclude an *alibi* defence for non-compliance with s. 402A. First, a distinction should be drawn between a bare denial and an *alibi* defence. Evidence of bare denial is in any case always admissible. In order to distinguish one from the other, the court must know the nature of the evidence. As was said in *Ku Lip See v. Public Prosecutor* [1982] 1 MLJ 194 at p 196:
>
> > If a trial court having considered the evidence put forward by the defence holds that such evidence amounts to evidence in support of an *alibi* for which no notice under s. 402A of the Criminal Procedure Code has been given, then he has no discretion in the matter but to exclude such evidence …
>
> It follows that, initially, the court cannot prevent an accused person from giving evidence. Having heard the evidence, then the trial court must decide the nature of the evidence. If it is only evidence of a bare denial, the evidence stays. If it is evidence in support of an *alibi* and no notice under s. 402A has been given, then he must exclude that part of the evidence from his consideration of the defence evidence.

[24] In this instant case, the learned trial judge correctly came to the conclusion that there was no supporting evidence on the accused's *alibi* defence.

[25] In any event the failure to give such notice under s. 402A(1) Criminal Procedure Code would render the evidence in support to be inadmissible.

[26] Notwithstanding no notice was given, the learned trial judge was prudent and circumspect in examining the merit of the defence of bare denial by the appellant. However after deliberating on the evidence of a bare denial the learned trial judge concluded that it did not raise any reasonable doubt on the prosecution case. At p. 489 appeal record the learned trial judge further adds:

A … Namun demikian, Mahkamah masih menimbang pembelaan atas meritnya. Selepas menimbang pembelaannya, saya dapati keterangan tidak munasabah. Dia tidak tahu nama penuh dan alamat majikannya, Pak Da walaupun dia telah bekerja dengannya semenjak tahun 1999 lagi. Dia juga tidak tahu alamat rumah
B sewanya sendiri sewaktu di Mersing. Adalah tidak munasabah bagi OKT tidak mahu balik sendiri ke Merchang semata-mata dia tidak ada duit. Duit boleh dipinjam daripada kawan-kawannya, Mamat, Man dan Nuar jika mahu balik. Pada keseluruhannya, keterangan OKT tidak lojik dan tidak munasabah dengan apa yang sebenarnya berlaku. Cerita OKT bahawa dia telah berada di tengah laut di
C Mersing menangkap ikan pada tarikh dan masa material adalah rekaan dan penafian semata-mata …

[27] At p 490, the learned trial judge concluded:

Beban ke atas pembelaan adalah ringan, sekadar menimbulkan
D keraguan yang munasabah dalam kes pendakwaan. Dalam kes ini, malangnya OKT gagal menimbulkannya.

Grounds Of Appeal No. (b), (c) And (f)

[28] We will now deal with appeal grounds No. (b), (c) and (f)
E together. The complaint of the appellant is that the learned trial judge had given undue weight to the testimony of PW4 alleging that his evidence was unbelievable and contradicted the evidence of the other prosecution witnesses. On the contrary we found that from pages 475 to 479 of the appeal record the learned trial judge had
F carefully and correctly addressed these very issues as raised by the appellant.

[29] The learned trial judge recognised there were some infirmities in the evidence of PW4 and this was reflected in his grounds of
G judgment at p. 475 appeal record where he said:

Memang benar terdapat percanggahan dan perkara yang tidak menyenangkan dalam testimony SP4, seperti yang dibangkitkan oleh peguambela. Misalnya:

H (i) Kegagalan SP4 mendengar bunyi "gedebuk" semasa kejadian. Harus diingat, dalam kes ini SP4 tidak pernah disoal oleh pihak pendakwa atau peguambela sama ada dia ada mendengar "gedebuk" atau tidak. Jadi, ketinggalan atau kegagalan saksi menyebut bunyi "gedebuk" dalam
I keterangannya tidak bererti keterangannya bercanggah dengan keterangan lain, dan oleh itu, tidak bererti SP4 tidak boleh dipercayai.

(ii) Keganjilan keterangan SP4 yang mengatakan dia tidak memberi pertolongan kepada abangnya simati semasa kejadian berlaku, dan dia berjalan-jalan di pasar malam selepas kejadian. Dalam hal ini umur SP4 ketika itu hanya 16 tahun sahaja. Sebagai seorang budak remaja, tindakan SP4 boleh diterima memandangkan bahawa telah ada orang dewasa yang datang memberi pertolongan pada abangnya. Lagipun, dia takut dan tidak berani membuat apa-apa. Jadi, dalam hal ini, tidak ada keganjilan dalam pelakuan SP4.

(iii) Kegagalan SP4 menyebut tajuk CD seperti yang diberitahu oleh SP3 dan ketiadaan keterangan SP2 dan SP3 bahawa simati ada bercakap dengan SP4 bukanlah faktor yang boleh menolak keterangan SP4, walaupun SP4 boleh disifatkan mempunyai sikap yang dipanggil oleh pendakwa sebagai sambil lewa atau acuh tak acuh.

(iv) Kegagalan pihak pendakwa memanggil "Pak Man" yang disebutkan oleh SP4 sebagai saksi tidak menjejaskan kes pendakwaan. Pak Man adalah bukan seorang saksi yang material dan kritikal yang perlu dipanggil untuk menceritakan kes pendakwaan sepenuhnya. Kes pendakwaan tidak bergantung kepada keterangan Pak Man untuk membuktikan kesnya. Peranan Pak Man dalam kes ini adalah sedikit sahaja sekadar menolong simati selepas kejadian. Sekiranya adegan pertolongan itu penting, maka testimoni Azmi (SP9) yang menolong angkat simati di tempat kejadian sudah memadai.

(v) Perbezaan jarak rumah SP4 dengan tempat kejadian di antara keterangan SP4 dengan Sarjan Mejar Ismail (SP11) bukanlah percanggahan material yang boleh menjejaskan kes pendakwaan. SP4 berdasarkan perkiraan jarak dengan kaedah berjalan kaki sejauh 100 meter yang memakan masa 3 minit, manakala SP11 berdasarkan perkiraan jarak 1 km dengan menaiki motorsikal yang memakan masa 20 minit. Kedudukan sebenar rumah SP4 tidak diketahui. Begitu juga laluan sebenar yang dilalui oleh SP4 dan SP11. Maka atas sebab perbezaan ini, tidaklah boleh kesemua keterangan SP4 diketepikan.

(vi) Perbezaan keterangan SP4 dan SP11 di mana SP4 menafikan beliau pernah memberitahu pihak Polis mengenai identiti OKT juga tidak menjejaskan kes pendakwaan. Seperti yang telah disebutkan sebelum ini, faktor usia dan sikap sambil lewa SP4 perlu diambil kira. Dalam konteks ini, keterangan SP11 pada malam kejadian

A adalah konsisten dengan kejadian pertemuan SP11 dengan SP4. Menurut SP11 tindakan mengesan OKT telah dilakukan setelah mendapat maklumat dari SP4. Persoalan di sini ialah jika bukan SP4 yang memberi maklumat OKT, bagaimanakah SP11 boleh mengambil tindakan
B mengesan dan mencari OKT beberapa jam selepas kejadian?

22. Harus diingat, walaupun terdapat kepincangan dalam keterangan SP4, ini tidaklah bermakna segala keterangannya tidak boleh dipercayai. Terpulanglah kepada Mahkamah
C selepas melihat SP4 memberi keterangan dan menimbangkan kepincangan itu untuk menerima mana-mana keterangannya yang lain Mahkamah fikirkan benar (*Mohamed Alias v. Public Prosecutor* [1983] 2 MLJ 172). Lagipun, SP4 tidak dicabar kebolehpercayaannya semasa SP4 memberi keterangan.

D **[30]** Upon a total evaluation of his evidence furnished during the trial, the learned trial judge made a finding that PW4 is a believable witness. At p. 495 appeal record the learned judge asserts:

(b) Saya sedar akan bahaya menerima keterangan SP4, kerana dia
E merupakan adik kepada simati dan juga terdapat percanggahan dalam keterangannya. SP4 ketika itu hanya berumur 16 tahun dan di dalam Mahkamah, saya perhatikan tingkah lakunya dan saya dapati dia tidak begitu cergas dan tidak fasih bertutur. Mungkin itulah sebabnya pihak pendakwa mengakui saksi ini bersikap sambil lewa dan acuh tak acuh. Dia jawab apa yang
F ditanya. Walaupun terdapat tali persaudaraan antara SP4 dengan simati dan percanggahan dalam testimoninya, ini tidak bermakna saya mesti menolak kesemua keterangannya. Saya dapati tali persaudaraan dan percanggahan yang tidak material itu dalam testimoninya tidak menjejaskan kebolehpercayaan saksi ini. Penolakan kesemua keterangan SP4 atas dasar
G tersebut akan menyebabkan ketidakadilan dalam kes ini.

[31] In any event, the credibility of a witness is primarily a matter for the trial judge, see: *Dato' Mokhtar Hashim & Anor v. Public Prosecutor* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC. Abdoolcader
H FJ, delivering the judgment of the Federal Court remarked as follows at p. 113:

There is a homogeneous concatenation of authorities on this principle and we refer to the *locus classicus* on this aspect in the
I passage in the judgment of Lord Thankerton in *Watt or Thomas v. Thomas* [1947] AC 484, 487. The Privy Council said in *Caldeira v Gray* [1936] MLJ 137, 138 that the functions of an appellate court,

when dealing with a question of fact, and a question of fact in which questions of credibility are involved, are limited in their character and scope, and that in an appeal from a decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, an appellate court must in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong.

[32] We are of the considered view that the learned trial judge was right in coming to the conclusion, at the close of the prosecution case, that from the testimonies of PW4, PW2 and PW3, the appellant was the one who attacked the deceased.

[33] From the evidence of PW2 and PW3 there was only one Malay male involved in the assault and it was the same man who hit the deceased's head with a brick and later assaulted him further as he fell to the ground. Inference can be drawn from their testimonies that it was the appellant who hit the deceased's head with the brick. It was one and same transaction and the evidence of PW2, PW3 and PW4 corroborated each other as to the assault and who assaulted the deceased on the night of the incident.

[34] Although PW4 did not see the incident where the deceased was being hit on the head with a brick, he however saw the appellant whom he recognised and identified as the very person who kicked the deceased on the face and chest. PW4 also picked up the appellant at an Identification Parade held.

[35] Acknowledging that PW4 was the brother of the deceased, the learned trial Judge rightfully warned and cautioned himself of the danger of accepting, by itself, the evidence of PW4.

[36] It is therefore our considered view that grounds of appeal No. (b), (c) and (f) are without any basis.

Ground Of Appeal (g)

Contraption Used As The Murder Weapon

[37] Encik Zamani Ibrahim, learned counsel for the Appellant, in his submission before this court argued that exh. P9A and P9B could not be the brick that was used during the assault on the deceased.

[38] It was however the finding of the learned trial judge that a brick was used as a weapon that killed the deceased when he said as follows at p. 494 appeal record:

> Walaupun senjata batu bata bukan suatu senjata tajam, dan tidak dapat dikenali yang mana satu batu bata yang telah digunakan untuk memukul kepala simati, tetapi **fakta yang simati telah dipukul di kepala dengan batu bata tidak dinafikan.** Objek yang telah digunakan ialah batu bata, suatu objek yang keras. (emphasis added)

[39] Ground of appeal (g) is therefore without any basis as this was never disputed before the learned trial judge.

Ground Of Appeal (d)

Rejection Of DW2's Evidence

[40] The appellant only called one other witness, DW2 Encik Wan Muda @ Wan Ngah bin Haji Wan Mamat. He was a rubber tapper from Kg. Baru, Pulau Rusa, Merchang, Terengganu and is also the uncle of the appellant. DW2 testified that he saw PW4 walking towards the Pasar Malam between 7.45 to 8pm on the night in question. Later he met PW4 at a stall that sells clothing. DW2 claimed that when he left the said stall some 3-4 minutes later, PW4 was still there.

[41] DW2 testified that as he left the stall, he walks towards a 'T'-junction where there was a commotion. DW2 saw PW9, Azmi bin Abas helping an injured man. DW2 was told of a fight and that the son of PW8, Mohamad bin Sulong was injured. DW2 did not see PW4 or the appellant at the scene of the crime.

[42] Learned counsel for the appellant therefore submitted that in view of what has been testified by DW2, it would not be safe to convict the appellant to rely solely on the testimony of PW4 without further corroborating evidence. It was suggested further that reasonable doubt had therefore been raised as to whether PW4 was indeed at the scene of the crime at the material time.

[43] The learned trial judge felt that the allegation of the meeting between DW2 and PW4 at the stall selling clothing was critical but questioned why it was never put to PW4 when PW4 testified that he could not recall meeting DW2 at 8pm on that eventful evening. The learned trial judge rejected the claim of the impugned meeting between DW2 and PW4 and further said at p. 491 appeal record:

Kegagalan menyoal balas SP4 atas dakwaan genting itu, iaitu SD2 telah berjumpa dan bercakap dengan SP4 di kedai baju lelong adalah serupa dengan penerimaan keterangan SP4 yang dia tidak perasan berjumpa dengan SD2 pada malam itu (*Wong Swee Chin v. Public Prosecutor* [1981] 1 MLJ 212. Dakwaan SD2 tidak boleh diterima kerana ia berunsur "surprise" di mana SP4 tidak diberi peluang untuk mengakui atau menafikannya. Adalah tidak munasabah bagi SD2 yang tidak langsung menyapa SP4 semasa SP4 melintas balai nelayan tiba tiba menyapa SP4 dalam kedai baju lelong. Cerita itu merupakan satu khayalan yang direka oleh SD2 sendiri tanpa asas.

[44] In *Chua Beow Huat v. Public Prosecutor* [1968] 1 LNS 24; [1970] 2 MLJ 29, Sharma J at p 32 referred to an Indian case where Mukharji J, said:

The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

[45] The importance of the issue of the failure to cross examine and to put across the essential and material case of the Appellant cannot be over emphasised. Such failure must mean that the testimony given by PW4 alleging that he cannot recall meeting DW2 on the night in question cannot now be disputed. Sharma J, at p. 32 in *Chua Beow Huat v Public Prosecutor (supra)* quoted the observation made by Lord Halsbury at p 76 in the House of Lords' case of *Browne v. Dunn*, reported in [1893] 6 R 69 thus:

A My Lords, with regard to the manner in which the evidence was given in this case, I cannot heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have
B given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

C

[46] In view of the above we agree with the decision of the learned trial judge to reject the evidence of DW2. As such ground of appeal (d) is therefore dismissed as well.

D **Ground Of Appeal (e)**

Medical Evidence

[47] PW5, Dr. Abdul Karim bin Haji Tajuddin, Head Pathologist at Hospital Tengku Ampuan Rahimah Klang testified that the
E cause of death of the deceased was due to head injury which was so severe that the life of the deceased could not have been saved. At pp. 47-48 he testified:

Saya teruskan pemeriksaan dalaman. Di kepala kesan sayatan baik, kepingan tulang 8 sm diameter telah ditanggalkan di sebelah kanan
F kepala. Di bawah selaput otak, tisu otak mengalami nekrosis, kematian tisu setempat. Nekrosis ini disebabkan kecederaan kepada otak akibat terkena benda tumpul dengan cukup kuat. Saya terukan pemeriksaan badan, organ-organ dalam didapati keadaan baik. Sebab kematian kepada mayat ini ialah kecederaan kepala yang
G teruk. Severe head injury. Kecederaan kepada otak di kepala simati tidak boleh selamatkan. Rawatan boleh melambatkan kematian. Jahitan di kepalanya ialah rawatan yang telah diberi kepada simati. Tidak ada penyakit lain yang mendorong kematian simati. Kecederaan itu disebabkan oleh kekerasan yang cukup kuat. Kecederaan simati tidak boleh disebabkan oleh jatuh.

H

ID 5 – batu bata dirujuk

ID5 boleh menyebabkan kecederaan di kepala simati.

[48] PW5 testified further that the head injury sustained by the
I deceased could have caused him to collapse resulting from the impact of being hit on the head making him lose his balance. This had caused him to fall down.

[49] The act of the appellant in striking or hitting the head of the deceased with such force supports the finding of the learned trial judge that the appellant intended to cause the death of the deceased. In *Virsa Singh v. State of Punjab* AIR [1958] SC 465, the Supreme Court held at p. 467 that:

> In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted.

[50] It is our view that the testimony of PW5 on the injuries sustained by the deceased is consistent with the evidence of PW2 and PW3 on their recollection of the incident on the fateful night where a brick was used to strike hard on the head of the deceased. They heard a noise which sounded like "gedebuk" and saw the deceased fell on the display table and on to the ground. The evidence of PW2 and PW3 reveals that the whole incident commencing from the moment the deceased was struck on the head to the time that he fell down and the assailant kicking the deceased who had collapsed by then, took less than one minute.

[51] Hence it is our considered view that the learned trial judge was correct in finding that the acts of the appellant in causing the death of the deceased would fall under s. 300(a), (c) or (d) of the Penal Code.

[52] The evidence of PW5 can be seen as complete and there was no cross-examination by learned counsel for the appellant. It means that this evidence has been fully accepted by the appellant. Consequently appeal on ground (e) is without any merit and is hereby dismissed.

Other Grounds

[53] In his judgment the learned trial judge took into account and deliberated on other relevant consideration before concluding that it was the appellant who caused the death of the deceased. The conduct of the appellant in absconding and thereafter surrendering himself coupled with the previous altercation between the appellant and the deceased were all taken into account by the learned trial judge.

[54] We further agree with the final finding of the learned trial judge that after weighing the version presented by the prosecution against the defence evidence he came to the conclusion that the defence failed to raise a reasonable doubt on the prosecution case. The learned trial judge succinctly put in his well sustained and forceful conclusion at p. 496 appeal record as follows:

> Selepas meneliti keterangan SP4 dan diuji dengan keterangan pendakwaan yang lain dan juga keterangan pembelaan terutama keterangan SD2, saya masih percaya dengan keterangan SP4 yang dia telah berada di tempat kejadian dan telah melihat OKT menendang dan menyepak simati semasa dia jatuh di tempat kejadian. Keterangan SP4 di sokong oleh SP2 dan SP3 yang menyaksikan simati dipukul di kepala sehingga jatuh dan orang yang sama terus memukul simati semasa dia jatuh. Orang yang memukul kepala simati semasa simati berdiri dan semasa simati jatuh ialah orang yang sama. Adalah penemuan fakta saya bahawa orang itu ialah OKT.

[55] We have given our careful and anxious consideration and we are of the considered view that the learned trial judge had addressed all the issues raised by the learned appellant in his judgment. We agree with him and hereby affirm his decision. This appeal is therefore dismissed.